

REMARKS

Reconsideration of the present in view of the following arguments is requested.

The previous indication of allowability of claims 15-19 was withdrawn in the present non-final Office Action in view of a newly cited reference. This new rejection under 35 U.S.C. 103(a) of now independent claim 15 is premised on the primary reference to Johnson et al., U.S. Patent No. 6,595,998. As explained below, Applicants have removed the Johnson '998 Patent as a reference pursuant to 35 U.S.C. 103(c). None of the remaining references of record disclose the elements attributed to the Johnson '998 Patent, so it is believed that the obviousness rejection of the pending claims is traversed.

The present application is based on a provisional application 60/459036, filed on March 31, 2003. The Johnson '998 Patent was owned by Spine Wave, Inc., at the time that this provisional application was filed, as reflected in the document recorded in 2001 at Reel/Frame 013690/0271. An assignment to Spine Wave for the present application is reflected in documents recorded at Reel/Frame 015501/0669. At the time the underlying provisional application was filed, the present claimed invention was owned by Spine Wave and the named inventors were under an obligation to assign the invention and related applications to Spine Wave. Thus, at the time of the invention of the present application, the Johnson '998 Patent and the present application were commonly owned by Spine Wave, under 35 U.S.C. 103(c).

The Johnson '998 Patent was published as US 2002/0183761 A1, on December 5, 2002, which is less than a year prior to the earliest effective filing date (March 31, 2003) of the present application. Thus, the Johnson '998 Patent does not qualify as prior art under 35 U.S.C. 102(a). Consequently, the provisions of 35 U.S.C. 103(c) apply and the foregoing evidence of common ownership is sufficient to remove the Johnson '998 Patent as a reference.

None of the other references of record disclose the features of Applicants' pending claims, whether taken alone or in combination. Thus, it is believed that

the present application, including claims 8-20 is in condition for allowance.
Withdrawal of the outstanding rejections and action toward a Notice of Allowance is requested.

Respectfully submitted,

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